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AUG 14 1990

No. 89-1952

Supreme Court, U.S.
FILED
AUG 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1989

ARTHUR JONES

Petitioner,

vs.

AMERICAN BROADCASTING COMPANIES, INC.

Respondents.

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

SPECIOUSLY, ABC ARGUES FOR THE FIRST TIME THAT THE "SYSTEM," NOT JONES, WAS THE "VILLAIN" OF ITS BROADCAST, AND DEFAMATORY STATEMENTS WERE "FIGURATIVE EXPRESSION" RATHER THAN STATEMENTS THAT PETITIONER WAS DISHONEST, HYPOCRITICAL AND UNSCRUPULOUS IN HIS TREATMENT OF THE ELEPHANT HERD.

In the Supreme Court, for the first time, ABC disingenuously claims it targeted not Arthur Jones but the "system" as the "villain" (ABC 6-7):[1]

> . . . However, the "villain" of the piece, to use Jones' phrase, was the "system" not Jones: As Hugh Downs asked rhetorically in the lead-in "Are we all at fault?"

The "outtakes" (not shown on the broadcast) document that ABC – not Jones – initiated the term "villain." Clearly, ABC was looking for dirt. In investigating David Meeks, ABC's Roger Caras inquired of John Freed:

> QUESTION: Everyone is guilty of some sins. What's David Meek's sins? What are his sins? In so far as animals go. What's he do wrong? (Exhibits to ABC's Motion for Summary Judgment, Ex. F, p. 105).

In the "outtakes" with Pat Derby, Caras probed and stressed the need for ABC to dramatize a "villain":

> QUESTION: Somewhere in this, because some bad things have been done – somewhere in here there's a villain. Now the players are Arthur Jones, Ralph Cramer, another keeper by

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[1] A "villain" is:

> . . . an opprobrious epithet implying great moral delinquency, and equivalent to knave, rascal or scoundrel. 44 Words and Phrases, "Villain."

> the name of Wilburt, David Meeks – a sometimes animal dealer who says he isn't an animal dealer . . .
>
> QUESTIONS (Cont'd): Travis Ward, who bought, didn't buy, bought, whatever – the Nautilus – somewhere in here there's a villain. Someone is doing something terrible to elephants, which was not the advertised intent when they were brought here. Can you identify who was doing bad things here for us?

Derby replies:

> The villain of this piece is our system . . . Pet. A-154-55.

These "outtakes" reveal that when Caras was looking for dirt he was looking for a human "villain." Nor was Caras concerned about an amorphous "system" concerning animal rights. Caras was paying allegiance to the philosophy and practice of confrontational broadcasting, articulated by Don Hewitt, creator and executive producer of *60 Minutes*.[2]

ABC depicted Arthur Jones as the personification of the cruel "system." According to ABC the elephants would have been better off slaughtered in their native Africa than subjected to an existence "worse than death" to which Jones "dumped" them:

> PAT DERBY: I really feel they should have been destroyed in Africa. It's a quick death. They would have been with their own herd.

---

[2] The trick has been not to lose the news buffs who make up our basic audience, while at the same time appealing to those I think of as the "Madames Defarges" who bring their knitting to the television set to watch heads fall into the basket just as they once brought their knitting to the guillotine. If you're a television producer, you kid yourself if you think you can make it without a fair share of them. See, *Minute by Minute . . .* , Random House, 1985, p. 27.

> They would not have known. To send them into anything else is not kind.

The issue before this Court is not whether Arthur Jones is a public figure and *New York Times v. Sullivan*, 376 U.S. 254 (1964) applies. The single issue is whether the broadcast, considered in its totality, is capable of defamatory meaning. Contrary to ABC's contention, the trial judge, in her pre-*Milkovich* decision, stated that at least one part of the broadcast was capable of impugning the honesty of Arthur Jones:

* * *

> This constitutes the statement in the broadcast which refers to Plaintiff's keeping a promise, or not, and perhaps to his "honesty." If these statements are factual in nature *they might be actionable*. However, the Court finds that these statements are non-actionable opinion. The second quoted statement is clearly the opinion of Roger Caras that he "assumed" and his "impression" of Jones was that the elephants would stay at the Jones' ranch forever. The statement does not imply "concealed or undisclosed set of defamatory facts" which would confirm that opinion. In context, [sic] of the broadcast it is clear that the first quoted statement is also non-actionable opinion and is in fact opinion based on the contents of the broadcast itself, rather than any set of "undisclosed" defamatory facts. [emphasis supplied]

(694 F.Supp. 1552-53)

The reaction of the Human Society of the United States (HSUS) after viewing the broadcast left no doubt the defamatory impact on the HSUS concerned the conduct of Jones. (Letter to Arthur Jones of 4/22/87, marked as Exhibit 13 to his deposition of June 18, 1987) The letter expressed no concern for the "system" of animal rights. It was, and is, the Petitioner's contention that the "sting" of

ABC's broadcast portrayed Jones as a lying, hypocritical, dishonest charlatan, who broke his public commitment and became cruel and indifferent to the future welfare of his elephants. Barbara Walters ironically, sarcastically and mockingly chided Jones' alleged disposal of the herd. She accused Petitioner of being "cute" with his elephants, enjoying the public novelty and attention, then indifferently "dumping" them to a fate "far worse than death":

> WALTERS: He who chooses to bring over a herd of elephants should carefully think of what he's going to do after he has them in his backyard, shouldn't he?
>
> * * *
>
> WALTERS: You know, we forgot, isn't it cute, we're going to have all these elephants, and we're going to adopt these dogs or these cats, but we don't think of the next day. Thank you for bringing this to our attention. Let's hope that something can be done about it.

Walters' comments hardly were directed at the "system."

For decades, libel lawyers referred to what is now popularly referred to as a "sound bite" as the "sting of the libel." The courts have been as vigilant in discovery as the libeler is artful in concealment. With its financial resources, ABC has the benefit of the highly paid, artful, dexterous writers and lawyers. Mass media personnel have invaded our local and national political campaigns, with the 30 second "sound bites" in order to communicate a lingering idea as the medium's message. As Russell Baker recently observed, the Savings and Loan scandal provoked no national gut reaction until the Democrats focused on a person, namely, the President's son, as the personal example of a greedy system gone awry:

* * *

All this proved that America has reached an age in which the entire intellectual content of a winning Presidential campaign could be fully expressed in three 30-second television commercials.

After a long and vain search for a way to interest the public in the savings and loan scandal – for a killer-diller, super-grabber sound bite, as it were – Democratic politicians may have found it in the President's son. Here's why:

A good sound bite has to dispel complexity (boring, small-print stuff turns off TV-viewing electorate) while turning politics into entertaining melodrama.

Since it's a television forum, the sound bite needs an uncomplicated character who can be reduced to the ever popular cartoon form (Willie Horton) or a star performer easy for a mass audience to identify. The President's son fits both requirements.

* * *

But it had two arresting elements. The President's son was one. The other was a loan of $100,000 somebody had made to the President's son. What caught the eye about this loan was that it didn't have to be repaid.

No matter how complicated the rest of the story might be, this was something the dimmest couch potato could understand. How come nobody ever offered him one of those $100,000 loans that don't have to be repaid?

In short, Democrats had the makings of a sound bite, a simple cartooned picture of what the incomprehensible savings and loan disaster was all about. Here was a gang of easy-come, easy-go money manipulators being so good to each other with other people's money that they got $100,000 loans they didn't have to repay. N.Y. Times Sat., July 14, 1990.

The trial judge found the broadcast capable of depicting Arthur Jones as a dishonest person but in her pre-*Milkovich* ruling found the law protected defamatory opinion. We respectfully submit that this Court, in *Milkovich*, counterbalanced the refuge the mass media seeks to conceal defamation under the rubric of "opinion."

ABC contends, for the very first time, that the District Court found the attack by ABC in "Save the Elephants" at Jones (i.e. the "system") was "exactly the sort of figurative expression repeatedly confirmed by this Court, . . . " (ABC brief, p. 1).

The transparent motive for ABC's new argument is to recast this case in a different mold due to the holding in *Milkovich v. Lorain Journal Co.*, 58 U.S.L.W. 4846 (U.S. June 21, 1990).

To dispel this inaccurate portrayal of the District Court's decision, Petitioner invites the Court's attention to key elements of the lower court's decision.[3]

> 4. The determination of whether the statements attacked are *protected statements of opinion* is also a question of law for the Court to decide. (A-32)
>
> * * *
>
> 5. Plaintiff [Jones] bears the burden of identifying particular statements in the broadcast, demonstrating that those statements are reasonably

---

[3] ABC's incorrect analysis of the decision under scrutiny exacerbates the outrage of its offensive accusations that Petitioner is guilty of "lifts," "reposition" or "cutting and pasting." (ABC's Brief, p.9) At all times, Petitioner has urged the Court to view the broadcast *in its entirety* to discern its overall libelous impact, rather than to do what ABC continue to do: isolate selected excerpts.

> capable of a defamatory connotation, and *demonstrating that the statements are fact rather than opinion.* (A-32)

The Court then observed:

> Further modification of the [constitutional] privilege [to defame "public figures"] was had in Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) . . . (A-35, A-36).

The District Court quoted *Gertz* extensively (A-36-A-40) including the sentence this Court identified as the "opening salvo in all arguments for protection from defamation actions on the ground of opinion, . . . " (See, 58 U.S.L.W. at 4850.[4]

The District Court then went on in its "careful and painstaking examination of Jones' contentions" (as ABC characterizes it on p. 11 of its Brief):

> It is a question of law, for the trial judge rather than a jury, as to whether or not the statements at issue are facts or non-actionable opinion, and, if fact, whether they are reasonably capable of a defamatory meaning. Diplomat Electric, Inc. v. Westinghouse Electric, Supply Co., 378 F.2d 377, 382 (5th Cir. 1967). There is a distinction between pure opinion and a mixed expression of opinion. Pure opinion is based on facts set forth in the broadcast or publication, or facts that are otherwise known or available to the reader or listener as a member of the public.

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[4] The *Gertz* dictum which this Court disapproved of in *Milkovich*, and which the District Court below also quoted, was:

> "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas . . . " 418 U.S. at 339-340 (footnote omitted).

> Mixed opinion is based on facts relating to a person or his conduct that are neither stated in the publication or broadcast nor assumed to exist by a party exposed to the communication. Rather, the communication "implies" that a concealed or undisclosed set of defamatory facts would confirm his opinion. Pure opinion is protected by the First Amendment; mixed opinion is not. Hay v. Independent Newspaper, Inc., 450 So.2d 293 (Fla. 2d DCA 1984). If a statement is susceptible to two interpretations, one defamatory and one not, a jury should determine whether the statement is defamatory. Hallmark Builders, Inc. v. Gaylord Broadcasting, 733 F.2d 1461, 1463 (11th Cir. 1984). (A-41 - A-42).

This traditional *Gertz* analysis of constitutional protection afforded so-called "opinion" speech also was decisively rejected by this Court's *Milkovich* decision:

> If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. Even if the speaker states the facts upon which he bases his opinion, if those facts are either incorrect or incomplete, or if his assessment of them is erroneous, the statement may still imply a false assertion of fact. Simply couching such statements in terms of opinion does not dispel these implications; . . . (58 U.S.L.W. at 4850).

This was precisely the issue below, and Petitioner argued he was entitled to have a jury resolve whether so-called "opinion" of ABC imputing dishonesty was rooted in facts which either were incorrect, incomplete, erroneously assessed (or indeed maliciously concocted).

ABC obfuscates the single question for review by repeated suggestion that Petitioner is "an acknowledged public figure." (ABC's brief, p.1). Petitioner's status as a "public figure" has nothing to do with the question before the Court.

The District Court's decision did not deal with the question of ABC's "actual malice." Consequently, the doctrine of *New York Times Co. v. Sullivan*, supra, is inapplicable to this Petition.

Caras' choice of the word "villain" in the ABC "outtakes" demonstrates that when the issue of "actual malice" is considered by the lower court, it necessarily would conclude a jury issue is presented.

ABC's disingenuous "repositioning" goes so far as to mischaracterize Petitioner's contentions below regarding the "sting" of ABC's libel (ABC brief, p.11). ABC states Petitioner contended ABC labeled him a "wacky screwball." While those words were employed at one point in Jones' lengthy retraction demand letter, ABC continues to ignore the *sine qua non* of the "Save the Elephants" broadcast which conveyed the defamatory nationwide message that Petitioner broke his word, was unscrupulous, was a hypocrite.

ABC blatantly dances around the District Court's clear finding that statements were made in "Save the Elephants" which " . . . refers to Plaintiff's keeping a promise or not, and perhaps 'honesty.' " (694 F.Supp. 1952). Only because the District Court afforded a *constitutional opinion privilege* to these defamatory statements were ABC's statements determined by the Court to be "non-actionable opinion."

Nothing below reflects that the District Court rested its conclusion on opinion speech which was "sort of figurative expression." ABC's endeavor to reconstruct this case in the aftermath of *Milkovich* is as thinly disguised as the Emperor's new clothes, and contains an equal amount of substance.

"Rhetorical hyperbole" or "loose, figurative" speech such as identified in *Letter Carriers v. Austin*, 418 U.S. 264,

284-286 (1976) does not apply to the defamatory opinions broadcast nationwide in "Save the Elephants." In *Letter Carriers*, this Court held the use of the words "traitor" and "scab" in the context of a lusty labor union dispute was not libelous. That doctrine has no application to ABC's defamatory opinion speech in this case. The District Court's decision shows the same "mistaken reliance on the *Gertz* dictum" (58 U.S.L.W. 4850) which existed in *Milkovich*, reversed by this Court.

Petitioner was ABC's "villain." At least, a jury should be given the opportunity to determine, as ABC posits, that it was the "system" which was libeled, and not Arthur Jones.

CONCLUSION

This Court should grant this petition and reverse the summary judgment entered below and remand for further proceedings.

Respectfully submitted,

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